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COURT OF CRIMINAL APPEALS
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In the
Court of Criminal Appeals
of Texas

AMBER GUYGER,
APPELLANT,

v.

THE STATE OF TEXAS,
APPELLEE.

On Appellant's Petition for Discretionary Review from
The Court of Appeals for the Fifth Court of Appeals District
Dallas County, Texas
In Cause No. 05-19-01236-CR

STATE'S REPLY TO APPELLANT'S PETITION FOR DISCRETIONARY REVIEW

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TABLE OF CONTENTS

Index of Authorities

Texas Cases

TEXAS STATUTES

Statement Regarding Oral Argument

Oral argument is not necessary in this case. The facts are not complex. Appellant entered Botham Jean's apartment, pointed a gun at him, and shot him. The legal issue isn't complex either. When, intending to kill, you shoot an unarmed man in the chest while he's sitting on his couch eating ice cream, that's murder regardless of where you think you are when you do it.

STATEMENT OF THE CASE

Appellant was indicted for murder.[1] *See* Tex. Penal Code § 19.02(b)(1), (2). She pleaded not guilty.[2] A jury convicted her.[3] The jury rejected her sudden-passion claim and assessed punishment at ten years' confinement.[4] *See* Tex. Penal Code § 19.02(a), (c), (d). The trial court pronounced sentence accordingly.[5]

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[1] Clerk's Record volume (CR) 1:18 (original indictment); CR8:2331 (amended indictment); Reporter's Record volume (RR) 8:92.
[2] RR8:93.
[3] CR8:2553; RR15:8.
[4] CR8:2552; RR16:129.
[5] RR16:130.

STATEMENT OF PROCEDURAL HISTORY

The Dallas Court of Appeals affirmed Appellant's conviction in an unpublished opinion. *Guyger v. State*, No. 05-19-01236-CR, 2021 WL 3438073 (Tex. App.—Dallas Aug. 5, 2021) (not designated for publication) (withdrawn).

The State filed a motion for rehearing on August 9, 2021. The court of appeals denied the motion for rehearing on November 17, 2021. That same day, the court withdrew its original opinion, vacated its judgment of that date, and issued a new opinion and judgment affirming Appellant's conviction. *Guyger v. State*, No. 05-19-01236-CR, 2021 WL 5356043 (Tex. App.—Dallas Nov. 17, 2021, pet. filed) (not designated for publication).

State's Reply to Appellant's Grounds for Review

State's Reply to Appellant's First Ground for Review

A mistake-of-fact claim can coexist with a self-defense claim, but it can't overlap it. The court of appeals correctly differentiated the statutory mistake-of-fact defense from the statutory defense of justification.

State's Reply to Appellant's Second Ground for Review

The court of appeals correctly determined that there is no evidence at all that Appellant was criminally negligent with respect to the result of her conduct. The evidence was undisputed that Appellant intended the result of her conduct, and her mistaken belief about the circumstances did not change her culpable mental state.

ARGUMENT

1. A mistake-of-fact claim can coexist with a self-defense claim, but it can't overlap it. The court of appeals correctly differentiated the statutory mistake-of-fact defense from the statutory defense of justification.

Appellant frames her first ground for review as asking whether mistake of fact can "coexist" with self-defense. Appellant's Pet. at 16, 27. But that's not the issue she raised on appeal, and it's not the issue the court of appeals decided. *See* Appellant's Br. at 80; State's Resp. Br. at 56; *Guyger*, 2021 WL 5356043, at *4–6. The real issue is whether the statutory mistake-of-fact defense can be bootstrapped into the statutory defense of justification. The court of appeals correctly held that it cannot. *Guyger*, 2021 WL 5356043, at *4–6.

1.1. Mistake of fact and self-defense are separate issues.

Mistake of fact and self-defense are separate defensive issues in different chapters of the penal code. Mistake of fact "is a defense" under chapter 8, while self-defense is a justification—which, in turn, is a defense—under chapter 9. *Compare* Tex. Penal Code § 8.02 *with* Tex. Penal Code §§ 9.02, 9.31, 9.32.

"Mistake of fact" is a defensive issue under chapter 8 of the penal code:

> It is a defense to prosecution that the actor through mistake formed a reasonable belief about a matter of fact

> if his mistaken belief negated the kind of culpability required for commission of the offense.

Tex. Penal Code § 8.02(a).

"Kind of culpability" means the culpable mental state for the offense. *Celis v. State*, 416 S.W.3d 419, 430 (Tex. Crim. App. 2013).[6] The culpable mental state for murder relates to the result of the conduct—causing death or serious bodily injury. *See Cavazos v. State*, 382 S.W.3d 377, 384 (Tex. Crim. App. 2012). The same is true for every type of criminal homicide in Texas, whether it be murder, manslaughter, or criminally negligent homicide. *Montgomery v. State*, 369 S.W.3d 188, 192–93 (Tex. Crim. App. 2012); *Schroeder v. State*, 123 S.W.3d 398, 400 (Tex. Crim. App. 2003); *Lugo-Lugo v. State*, 650 S.W.2d 72, 80–81 (Tex. Crim. App. 1983); *see* Tex. Penal Code §§ 19.02, 19.04, 19.05.

Meanwhile, self-defense is a justification defense under chapter 9 of the penal code:

> A person is justified in using deadly force against another … if the actor would be justified in using force against the other … and … when and to the degree the actor

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[6] Appellant presents *Celis* as a "plurality opinion." *See* Appellant's Pet. at 17 (citing *Celis* as "plurality op."). This is incorrect. While four judges joined the opinion of the Court, which would ordinarily be merely a plurality among this Court's nine judges, two judges of this Court did not participate in the decision. *See Celis*, 416 S.W.3d at 434 (noting that "Meyers and Hervey, JJ., did not participate"). That means the Court's opinion was joined by four judges *out of seven*—which makes it a majority opinion.

> reasonably believes the deadly force is immediately necessary … to protect the actor against the other's use or attempted use of unlawful deadly force; or … to prevent the other's imminent commission of aggravated kidnapping, murder, sexual assault, aggravated sexual assault, robbery, or aggravated robbery.

Tex. Penal Code § 9.32(a).

A "reasonable belief" is a belief that would be held by an ordinary and prudent person in the same circumstances as the actor. Tex. Penal Code § 1.07(a)(42). This standard is objective: It "assumes that a defendant may act on appearances as viewed from his standpoint," but it "also assumes the 'ordinary prudent man test of tort law.'" *Werner v. State*, 711 S.W.2d 639, 645 (Tex. Crim. App. 1986).

Thus, the mistake-of-fact defense looks at whether the defendant had the culpable mental state for the offense, while the justification of self-defense looks at whether the defendant's belief that deadly force was immediately necessary was reasonable. The court of appeals correctly recognized that those are two different and separate questions. *Guyger*, 2021 WL 5356043, at *4–7.

1.2. Keeping the issues separate doesn't eviscerate self-defense.

In asking this Court to mix oil and water, Appellant asserts that unless the statutory mistake-of-fact defense can be incorporated into the justification of self-defense, a person who fires a handgun at

someone else can never be justified "unless completely justified by the surrounding circumstances." Appellant's Pet. at 20. Not so.

Because the justification of self-defense looks at the reasonableness of the defendant's belief, it already accounts for reasonably-mistaken beliefs. Indeed, lower courts have held that a person's reasonable-but-mistaken belief can raise a justification issue. *See Venegas v. State*, 660 S.W.2d 547, 549–50 (Tex. App.—San Antonio 1983, no pet.) (attempted-capital-murder defendant's mistaken belief about identify of intruders, which raised mistake-of-fact defense because it negated two culpable mental states for attempted capital murder, also raised defense-of-property justification).

Such a holding is in line with cases that have held that the issue of self-defense can be raised by evidence of "apparent danger" even if there is no evidence of actual danger. *Hamel v. State*, 916 S.W.2d 491, 493 (Tex. Crim. App. 1996); *Dyson v. State*, 672 S.W.2d 460, 463 (Tex. Crim. App. 1984); *see also Broussard v. State*, 809 S.W.2d 556, 558–59 (Tex. App.—Dallas 1991, pet. ref'd). It's also in line with cases that have held that a jury charge on self-defense may not require the jury to find that the victim was actually using or attempting to use unlawful deadly force before it could acquit the defendant. *See Jones v. State*, 544 S.W.2d 139, 142–43 (Tex. Crim. App. 1976); *Torres v. State*, 7 S.W.3d 712, 714–15 (Tex. App.—

Houston [14th Dist.] 1999, pet. ref'd). This is because, under the doctrine of apparent danger, the evidence does not have to show that the victim was actually using or attempting to use deadly force, so long as the defendant reasonably believed, as viewed from her standpoint at the time, that deadly force was immediately necessary. *Valentine v. State*, 587 S.W.2d 399, 401 (Tex. Crim. App. 1979).

This Court has held that the way to correctly charge a jury on this issue is simply to 1) tell the jury that conduct is justified if the defendant reasonably believed it was immediately necessary, and 2) correctly define "reasonable belief." *Valentine*, 587 S.W.2d at 401. It's not to shoe-horn the statutory mistake-of-fact defense into a self-defense instruction where it doesn't belong.

1.3. Keeping the issues separate doesn't prevent a defendant from raising both—it just means Appellant didn't do so in this case.

Appellant also suggests that keeping mistake of fact and self-defense separate would prevent a defendant from raising both defenses at trial. Appellant's Pet. at 27. Hardly. This Court has held that a defendant is entitled to instructions on any defensive issues that are raised by the evidence, even if the defenses are inconsistent with each other. *Bowen v. State*, 162 S.W.3d 226, 229–30 (Tex. Crim. App. 2005).

But this Court explicitly grounded that holding on its recognition of "the independence of *separate* defenses." *Id.* at 229

(emphasis added). In other words, it's the fact that different statutory defenses, such as mistake of fact and self-defense, are separate in the first place that gives a defendant the right to raise them even if they are inconsistent with each other.

Moreover, the court of appeals never said that Appellant couldn't raise both mistake of fact and self-defense; it simply said that mistake of fact wasn't raised by the evidence in this case. *Guyger*, 2021 WL 5356043, at *4–7. A defendant has a right to an instruction on a defensive issue only if it is raised by the evidence. *Shaw v. State*, 243 S.W.3d 647, 657–58 (Tex. Crim. App. 2007); *Hamel*, 916 S.W.2d at 493. Appellant never—and still has not—pointed to any evidence of a mistaken belief that would have negated her intent to kill. Instead, she pointed to evidence of her mistaken belief about the circumstances, but nothing that indicated she was mistaken about whether shooting Botham would kill him. *Guyger*, 2021 WL 5356043, at *5. That, rather than her raising a separate self-defense claim, is why the court of appeals held that she wasn't entitled to a mistake-of-fact instruction. *Guyger*, 2021 WL 5356043, at *4–6.

And that also leads directly to Appellant's second ground for review.

2. The court of appeals correctly determined that there is no evidence at all that Appellant was criminally negligent with respect to the result of her conduct. The evidence was undisputed that Appellant intended the result of her conduct, and her mistaken belief about the circumstances did not change her culpable mental state.

In her second ground for review, Appellant argues that the court of appeals should have acquitted her of murder and convicted her of criminally negligent homicide instead because "she was not paying close enough attention to her surroundings" when she entered Botham Jean's apartment. Appellant's Pet. at 35.

The court of appeals correctly rejected this argument. Noting that Appellant relied only "on certain *circumstances* leading to her conduct," rather than "her intent to cause the result of her conduct—her intent to kill Jean by shooting him," the court determined that Appellant's evidence had "no bearing on whether she acted intentionally or knowingly or instead acted with criminal negligence" when she shot Botham Jean. *Guyger*, 2021 WL 5356043, at 8 (emphasis in original).

This was correct because Appellant's argument was based on a flawed premise: that her *conduct*—shooting Botham Jean—was the *result*. That is simply not so. *See* Tex. Penal Code § 1.07(a)(22)(A), (C) (distinguishing conduct from result); *see also Cook v. State*, 884 S.W.2d 485, 491 (Tex. Crim. App. 1994) (holding that "intent to engage in conduct" is not an element of "result of conduct" offenses).

Appellant wasn't charged with *entering Botham's apartment* while disregarding a risk that she might shoot him; she was charged with *intentionally causing Botham's death* by shooting him.

And to the question of Appellant's intent to kill, the court concluded that the evidence was "undisputed": Appellant intended to kill Botham Jean when she shot him. Her intent to cause the result made the shooting murder, and where she believed she was when she did so didn't change that. *Id.* at *7–8 (citing *Schroeder*, 123 S.W.3d at 400; *Lugo-Lugo*, 650 S.W.2d at 81; *Salinas v. State*, 644 S.W.2d 744, 746 (Tex. Crim. App. 1983)).

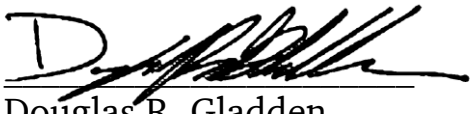
3. Conclusion

The court of appeals decided that the mistake-of-fact defense relates only to the culpable mental state, which is exactly what this Court has held. The court also decided that evidence of Appellant's belief about the circumstances surrounding her conduct had no bearing on her intent to cause the result of her conduct, which is exactly what this Court has said in homicide cases. The court decided nothing that this Court hasn't already decided, and its opinion doesn't conflict with any other applicable decisions of this Court or the United States Supreme Court. There is no reason for this Court to grant discretionary review. This Court should refuse the petition.

Prayer

The State prays that this Honorable Court refuse the petition.

Respectfully submitted,



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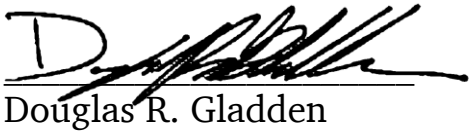

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